

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

Carol Rougvie, et al. ) No. 2:15-CV-00724-MAK  
Plaintiffs, )  
v. )  
Ascena Retail Group, Inc., et al., )  
Defendants. )

## **OBJECTOR GRETCHEN CAREY'S MEMORANDUM SUMMARIZING DISCLOSURE OF SETTLEMENT TERMS**

Objector Gretchen Carey, by and through undersigned counsel, hereby responds to the Court’s order requiring Objectors to disclose the terms of their settlements with class counsel. (Doc. 357.) In the brief below, Ms. Carey provides a brief background of her objection and the settlement of her appeal. She then provides a description of the terms of her settlement with Class Counsel, which provided for funds from their attorney fees award and not from any monies designated for the Class. Last, she notes that Objectors should be permitted further briefing on the disgorgement issue.

## I. Background

Objector Gretchen Carey timely filed her objection to the proposed Class Action Settlement on April 18, 2016. (Doc. 123) Ms. Carey objected that the Class Action

1 Settlement should not be approved because a) the settlement did not provide recovery for  
 2 cash payers without a receipt; b) the Settlement excluded purchases after a set date, but  
 3 released the claims of purchasers for purchases made after that date; and c) the Settlement  
 4 failed to consider state laws providing minimum consumer recoveries, which might  
 5 provide for a better recovery for class members in certain states. (*Id.*)

6 On May 20, 2016, this Court held a Final Fairness hearing on the Class Action  
 7 Settlement, at which Objector Carey and her fellow objectors appeared. Ms. Carey filed a  
 8 post-hearing memorandum after the hearing (Doc. 168) and a notice of supplemental  
 9 authority supporting her objections. (Doc. 179.) The Court approved the Class Action  
 10 Settlement on July 29, 2016, including the award of attorneys' fees of \$5,311,470.24 to  
 11 plaintiffs' counsel ("Class Counsel"). (Doc. 184, 185) The Court granted Class Counsel  
 12 leave to move to distribution of additional proceeds within 45 days of the last expiration  
 13 date for a voucher. (Doc. 185 ¶ 5.) The Court did not make changes to the Class Action  
 14 Settlement based on Ms. Carey's objections. (*Id.*)

15 Ms. Carey filed a Notice of Appeal to the Third Circuit on August 11, 2016. (Doc.  
 16 191.) On October 25, 2016, the Third Circuit Court of Appeals assigned the matter to  
 17 mediation before Chief Circuit Mediator Joseph A. Torregrossa. The mediation was  
 18 scheduled for November 30, 2016. Prior to the mediation, the objectors submitted  
 19 mediation statements discussing their positions. Objectors attended this mediation, but  
 20 were unable to reach settlement.

21 On February 8, 2017, Objector Carey filed her Opening Brief in the Third Circuit.  
 22 Shortly afterward, the Third Circuit set another mediation, this time for March 24, 2017.  
 23 Counsel for Ms. Carey appeared by telephone. Although Ms. Carey reached a settlement  
 24 in principle at the mediation, one of the objectors refused to settle, so the matter did not  
 25 settle. That objector later agreed to a settlement.

26 As such, the Third Circuit Mediator, Mr. Torregrossa, emailed the parties  
 27 confirming the settlement of each appeal. The appeal was to be dismissed upon execution  
 28 of settlement documents; as such, each objector gave up their right to pursue their appeal.

1 Ms. Carey entered into a settlement agreement with Plaintiffs' counsel on or about April  
 2 20, 2017. She dismissed her appeal with prejudice on April 25, 2017. In exchange, Ms.  
 3 Carey gave up her right to appeal and to pursue the objections she had made on behalf of  
 4 the class.

5 Only after the appeals were dismissed, and the objectors had given up their rights  
 6 to pursue their appeals, did class members Barbara Comlish and Kathryn Artlip move to  
 7 intervene (on May 12, 2017). (Doc. 263.) They asked objectors to disclose the terms of  
 8 their settlements and requested an order disgorging any money received—no matter  
 9 why—“back into the settlement fund available for class members.” (*Id.* at 2.) But as  
 10 discussed below, Ms. Carey did not receive any money from the settlement fund  
 11 available for class members; she received money from the Court-approved award of  
 12 attorneys’ fees to Class Counsel in exchange for giving up her right to pursue her appeal.  
 13 Ms. Comlish and Ms. Artlip did not timely object to the award of attorneys’ fees to Class  
 14 Counsel; they should not now, as intervenors, be allowed to collaterally attack an  
 15 agreement made between Class Counsel and an objector on distribution of those fees.  
 16 Those fees were reasonable given the claims being released, and taking away those fees  
 17 would also require unwinding the settlement and reinstating the appeal (and recovering  
 18 monies paid to class members, perhaps even immediately).

19 **II. Terms of Settlement Agreement**

20 Ms. Carey made the following agreement with Class Counsel, which was  
 21 predicated in large part on the value of her claim and the value of her counsel’s efforts to  
 22 secure her relief.

23 Class Counsel agreed to pay, from their attorney fee award, the sum of  
 24 \$100,000.00 which was distributed in three parts. Fifty percent was paid upon Class  
 25 Counsel’s receipt of 50% of Class Counsel’s attorney fees under the Class Settlement  
 26 Agreement approved by the Court (Doc. 185); 25% was paid after receipt of Class  
 27 Counsel’s receipt of the next 25% of Class Counsel’s fees, and the remaining 25% was  
 28 paid upon Class Counsel’s receipt of the remaining 25% of Class Counsel’s attorneys’

1 fees. This settlement amount was for Ms. Carey's work in pursuing her objections and  
2 attorneys' fees for her counsel, who had filed objections, participated in the final fairness  
3 hearing, filed supplemental briefing, filed an Opening Brief in the Third Circuit, and  
4 participated in two mediations. In consideration for this settlement amount, Ms. Carey  
5 agreed to dismiss her appeal and "to take no further action" in the matter. Specifically,  
6 she agreed to refrain from further filings in the appeal or this action (the "Rougvie  
7 Matter"):

8           The Objector Parties agree that they will not file nor will they  
9 cause to be filed any further motions, objections, notices of  
10 appeal, or other filings in the Rougvie Matter or the Appellate  
11 Matter other than that effectuating the withdrawal of their  
12 objections and the dismissal of their appeal and obtaining any  
sums from the District Court that the Objector Parties  
provided as security in the form of an appeal bond.

13 In addition, she agreed to release any objections, rights to appeal, or claims she had  
14 concerning the Class Settlement:

15           The Objector Parties hereby irrevocably and unconditionally  
16 release, remise, and forever discharge any objections, rights  
17 to appeal, or claims they have, may have, or could have, now  
18 or in the future, concerning: (a) the Class Settlement; (b)  
certification of the class in the Rougvie Matter; (c) and/or  
19 Class Counsel's requests for attorneys' fees in the Rougvie  
Matter of any nature...

20           If Ms. Carey is required to disgorge her settlement payment, then Ms. Carey's  
21 rights to object would have to be reinstated.

22 **III. Ms. Carey Should Be Permitted to Brief the Effect of Disgorgement on Her  
23 Claims**

24           Because this Court's Order only permits Ms. Carey to disclose the terms of her  
25 agreement, Ms. Carey has confined her discussion in this brief to that issue. In addition,  
26 her Settlement Agreement provides that she will not file additional motions or objections  
27 in this case.

That said, Ms. Carey is filing a joinder in the motion for leave to brief the issue filed by Objectors Mager and Schultz. (Doc. 372.) In brief, she will argue that this Court cannot order disgorgement of monies paid by class counsel pursuant to an agreement made through mediation in the Third Circuit without reopening the Class Action Settlement and reinstating the objections to the settlement. The Objectors' rights are being affected by the Court's decision, and they request the opportunity to be heard through briefing in addition to their appearance at the hearing.

Respectfully submitted this 21st day of December, 2018.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

/s/ Amy M. Wilkins  
Amy M. Wilkins